



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: SEPTEMBER 30, 2022

IN THE MATTER OF:

Appeal Board No. 623735

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determinations disqualifying the claimant from receiving benefits, effective November 21, 2021, on the basis that the claimant voluntarily separated from employment without good cause and, in the alternative, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to November 21, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances on behalf of the claimant. By decision filed May 18, 2022 (A.L.J. Case No.

), the Administrative Law Judge sustained the initial determination of voluntary quit without good cause.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant was employed as a full-time travel registered nurse by the employer, HCTN Local LLC, from September 19, 2020 through November 11, 2021. She was assigned by contract to SUNY Upstate Hospital ('Upstate'). The claimant's original contract with Upstate did not state an

influenza vaccine was required. In the last several months of her assignment with Upstate, the claimant's contract with Upstate was renewed about every two weeks.

On September 21, 2021, the employer sent an email to the claimant informing her that Upstate required her to receive an influenza vaccine or to sign an annual declination by September 24. The claimant submitted an annual declination form.

On October 27, the employer informed the claimant that Upstate required a specific influenza declination. The claimant submitted the declination form which indicated by her refusal to receive an influenza vaccine that she was required to wear a mask in areas where patients or residents may be present. Upstate notified the employer that it only allows medical exceptions to the influenza vaccine requirement for travel staff. Upstate employees are not required to receive an influenza vaccine.

On November 11, the employer sent a text message to the claimant informing her that she would be removed from the work schedule if she did not submit proof of her influenza vaccine or submit a medical exemption by November 12. The claimant did not receive an influenza vaccine or submit a medical exemption form by November 12. On November 12, 2021, the employer removed the claimant from the work schedule.

**OPINION:** The credible evidence establishes the employer removed the claimant from the work schedule with Upstate for not receiving an influenza vaccine as of November 12, 2021. While the claimant was told that she needed to get an influenza vaccine or submit a medical exemption form, Upstate did not have the same requirements for its own employees. Additionally, the declination form the claimant was required to sign and submit only indicated those who have declined an influenza vaccine must wear masks in areas where patients or residents may be present. We note that the employer did not appear at the hearing to present any evidence regarding the reason(s) for its change in policy or evidence to establish that its policy in this regard was reasonable. Under these circumstances, the claimant's decision to not receive the influenza vaccine or obtain a medical exemption does not rise to the level of misconduct. Further, the claimant's separation cannot be considered a voluntary leaving of employment on the theory of provoked discharge as there is no evidence that the employer was required to have employees receive the influenza vaccine. Accordingly, we conclude that the claimant's employment

ended under non-disqualifying conditions.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determinations, disqualifying the claimant from receiving benefits, effective November 21, 2021, on the basis that the claimant voluntarily separated from employment without good cause and, in the alternative, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to November 21, 2021 cannot be used toward the establishment of a claim for benefits, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER